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# In the Supreme Court of the United States

OCTOBER TERM, 1978

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No. 78-589

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LEWIS W. POE,  
*Petitioner,*

vs.

UNITED STATES OF AMERICA,  
*Respondent.*

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## **PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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October, 1978

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THE NINTH CIRCUIT**

Lewis W. Poe, petitioner, prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

**OPINIONS BELOW**

The District Court for the District of Hawaii rendered judgment without opinion. The Court of Appeals for the Ninth Circuit affirmed without opinion in an unpublished order.

## JURISDICTION

The judgment of the Court of Appeals (App. A, *infra*, p. A1) was entered on May 8, 1978. A timely petition for rehearing was denied without opinion on July 12, 1978 (App. B, *infra*, p. A2). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether 28 U.S.C. 2680(h), as amended March 16, 1974 by Section 2 of Public Law 93-253, 88 Stat. 50, governs this case or whether the rule of *Feres v. United States*, 340 U.S. 135 (1950), governs this case.

2. If the *Feres* holding is deemed controlling in this case:

Whether the District Court erred when it prematurely dismissed the plaintiff's complaint on the basis of *Feres* without allowing the plaintiff to present any evidence to resolve a dispositive question of fact, to wit: whether plaintiff's injuries were *not* sustained in or arose out of a course of activity incident to his military service.

## CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

The First Amendment provides, in part:

Congress shall make no law \* \* \*; \* \* \* abridging the freedom of speech, \* \* \*; or the right of the people \* \* \* to petition the Government for a redress of grievances.

The Fourth Amendment provides, in part:

The right of the people to be secure in their persons, \* \* \*, against unreasonable searches and seizures, shall not be violated, \* \* \*.

The Fifth Amendment provides, in part:

No person shall \* \* \* be deprived of life, liberty, or property, without due process of law; \* \* \*.

The Ninth Amendment provides:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

28 U.S.C. 2680 provides, in pertinent part:

"The provisions of this chapter and section 1346 (b) of this title shall not apply to—

(a) \* \* \*.

(b) \* \* \*.

\* \* \*

\* \* \*

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: *Provided*, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346 (b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection "investigative

or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) \* \* \*

(j) \* \* \*

\* \* \*

\* \* \*"

Section 2 of Public Law 93-253, 88 Stat. 50, provides:

"Sec. 2. Section 2680 (h) of title 28, United States Code, is amended by striking out the period at the end thereof and inserting in lieu thereof a colon and the following: "Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346 (b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, 'investigative or law enforcement officer' means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law."

Approved March 16, 1974."

Paragraph 4-35 of Air Force Manual 168-4, "Administration of Medical Activities," dated 15 March 1973, provides:

*"Disposition of Person Who Refuses Professional Care.* A medical board will examine any military member who refuses to submit to medical or dental treatment,

surgical operation, or diagnostic procedure. If the person bases his refusal on religious grounds, the hospital commander will arrange for the appointment of a chaplain as an additional member of the board. The board must decide whether:

a. The patient needs the treatment in order to properly perform his military duties, and

b. The treatment can normally be expected to produce the desired results. When the decision on both points is affirmative, the person will be so advised. If he still refuses, he may be tried by courts-martial. Whether or not disciplinary action is taken, the unit commander may initiate appropriate action, such as discharge, retirement, etc. However, before doing so, he will refer the case to HQ USAF/SGP, Wash DC 20314, for consideration and review.

NOTE: When emergency treatment, surgery, or diagnostic procedure is required to preserve the health or life of the patient, it may be performed with or without his permission. The same is true when a diagnostic procedure or treatment is necessary to protect the health or life of a patient who has been declared by a qualified psychiatrist to be mentally incompetent."

Paragraphs 1a, 1c, 1g, and 2a of Air Force Regulation 123-11, "The Inspector General Complaint System," dated 5 June 1973, provide:

1. *Air Force Policy on Presenting and Hearing Complaints:*

a. All members of the Air Force, military and civilian, have the right to present complaints without



fear of retaliatory action. Any person who feels that such action has been taken against him for having submitted a complaint should report it promptly to the base inspector.

\* \* \*

c. Any military or civilian member who has knowledge or [sic] mismanagement, violation of Air Force directives, or the existence of an error or an injustice, deficiency, irregularity, waste, fraud or similar condition has a duty to report it to his supervisor, unit complaints officer/NCO, commander, inspector or inspector general.

\* \* \*

\* \* \*

\* \* \*

g. A credible complaint system must exist to give fair and prompt consideration to a member's complaint and provide redress when warranted. The complainant must feel he can enter the system at any level without fear of reprisal or stigma. Interviews or conferences are conducted at times and places convenient for the complainant. All personnel should be aware that the complaint system exists to help them. A cooperative attitude must be exhibited and fostered through proper responsive consideration of all complaints. Follow-up action must be taken on each complaint and disposition placed on record. No form of reprisal, however subtle, is to be taken against the individual.

\* \* \*

## 2. Commander's Responsibilities:

a. The commander of each Air Force activity:

(1) Insures that every Air Force member has an Air Force channel of communication to voice a complaint.

(2) Insures that personnel are aware of the complaint system established by this regulation.

(3) Maintains an "open door" policy to insure that personnel have easy access to him to air complaints or seek counsel.

(4) Insures that each complaint, whatever the source, is resolved fairly according to Air Force policy and that the complainant is provided a prompt reply to his complaint.

(5) Never prevents or hinders any member from presenting a complaint to higher authority.

(6) Insures that no reprisal action, however subtle, is taken against a complainant.

## STATEMENT OF THE CASE

Former Air Force Captain Lewis W. Poe filed a complaint on October 26, 1976 in the United States District Court for the District of Hawaii, alleging that he was unlawfully arrested on May 29, 1974 by several Air Force policemen at his assigned place of duty, Office of Data Automation, Dover Air Force Base, Delaware. Poe claimed that the Air Force policemen were unlawfully directed by the Base Commander to arrest him. Poe alleged that said arrest was without warrant, without probable cause, and in violation of Air Force regulations. Poe claimed

the Base Commander *knowingly* acted in violation of and in disregard of Air Force regulations.

Poe's arrest on May 29th followed an incident on May 28, 1974 when the Base Commander ordered Capt. Poe to report to the base hospital, apparently to be subjected to a psychiatric examination. In response to said order, Poe asked the Base Commander if he had considered the lawfulness of his order since Poe had refused and was refusing to submit to any type of *military* psychiatric examination. The Base Commander did not reply.

Capt. Poe refused to submit to any *military* psychiatric examination because he claims there was no medical cause therefor and because he had evidence to support his belief that there was a concerted effort to discredit him and to cause his unauthorized separation from the Air Force after he had routinely filed three Inspector General Complaints.

Poe did not report to the base hospital as directed by the Base Commander because, he contends, the order was retaliatory in nature and its issuance was in violation of Air Force regulations. Poe believed that compliance with said order would result in his hospitalization as an inpatient in a psychiatric hospital at Wright-Patterson AFB, Ohio, contrary to the due process provisions of paragraph 4-35 of Air Force Manual 168-4. Indeed, this is precisely what occurred.

At the time of the Base Commander's order, paragraph 4-35 of Air Force Manual 168-4 clearly indicated that any person who refused to submit to medical treatment or diagnostic procedure will be examined by a medical board to determine whether the person needs the treatment in order to properly perform his military duties. Capt. Poe asserts that he was satisfactorily and properly performing

his assigned duties when the Base Commander's order was issued. Since no medical board had convened or was in the process of convening to examine Capt. Poe prior to the issuance of the Base Commander's "hospitalization order," Poe believed said order to be illegal and a denial of due process of law. Thus, Poe believed that he was not legally nor morally bound by any standard of military duty to obey such an order. Poe believed and was prepared to prove that the order was issued in reaction to Poe's efforts to register legitimate complaints through the normal channels provided by the Inspector General system.

Poe's *pro se* complaint in the District Court contains the following allegations:

"49. On May 28, 1978, the Base Commander, in bad faith and in collusion with the Hospital Commander and the Wing Commander, *unlawfully* ordered the hospitalization of Capt. Poe *under the guise* of a legitimate inpatient evaluation, in violation of paragraph 4-35 of AF Manual 168-4 and in violation of the non-retaliatory provisions of AF Regulation 123-11.

50. This particular act was done in furtherance of a conspiracy to discredit Poe and to 'medically' separate Poe from the Air Force when in fact there was nothing medically wrong with Poe. The abusive and malicious employment and perversion of such a medical procedure or process so as to effect the 'medical' separation of Poe from the Air Force was contrary to the intended purpose of the applicable law, such as, Chapter 61, Title 10, U.S.C. [Retirement or Separation for Physical Disability]."

Poe claims that at the time of the arrest, military policemen were enforcing an allegedly illegal arrest order

which was issued by the Base Commander. Poe claimed he was assaulted, arrested, searched, taken to the base hospital, and then transported by vehicle in the presence of an Air Force policeman to Andrews AFB, Maryland, where he was confined in a psychiatric ward. Two days later, on May 31, 1974, Poe was flown to Wright-Patterson AFB, Ohio and confined in another psychiatric ward.

On September 4, 1974, Poe was officially separated from the Air Force for a "mental disability" which Poe claims *did not actually exist*; his separation was "officially supported" by Air Force medical documentation, dated June 27, 1974, which Poe further claims was erroneous and without a basis in fact.

Having exhausted his available administrative remedy, Poe filed a complaint for damages against the United States, pursuant to the Federal Tort Claims Act, as amended March 16, 1974 by Section 2 of Public Law 93-253, 88 Stat. 50. See 28 U.S.C. 2680(h).

The jurisdiction of the District Court was invoked pursuant to 28 U.S.C. 1346(b).

In his complaint, Poe alleged that his injury arose out of assault, false arrest, false imprisonment, and abuse of process by federal employees of the Department of the Air Force who were acting under color of federal law or in the line of duty at an operational level of command and who were empowered by law to execute searches, to seize evidence, or to make arrests. Poe further alleged that the tortious acts of said federal employees were in violation of the First, Fourth, Fifth, and Ninth Amendments and in violation of the Air Force's own regulations.

On December 27, 1976, without answering or directly contradicting Poe's allegations, the defendant United States

filed a motion to dismiss Poe's complaint. On February 4, 1977, a hearing on the Government's motion was held before the District Judge. Poe argued that Section 2 of P.L. 93-253 governed the instant case; that his injuries were unlawfully caused by Air Force employees who were empowered by law to make arrests; that his injuries were *not* sustained in the course of military duty and that he was entitled to prove and recover damages therefor. After argument, the District Court, without affording Poe an opportunity to present evidence, ruled:

"\* \* \* and I'm not at all confident that I know what the law is right now, \* \* \*. \* \* \*, it appears to me that this case is governed by *Feres* and *Gamage*, and I'll grant the motion to dismiss."

On February 14, 1977, the District Court filed its judgment and its order of dismissal, simply stating that the case was governed by *Feres v. United States*, 340 U.S. 135 (1950).

In *Feres*, this Court stated:

"the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." 340 U.S. at 146.

On March 24, 1977, Poe filed a notice of appeal. After briefing by the parties, a hearing was held before the Court of Appeals for the Ninth Circuit on April 19, 1978. At the conclusion of said hearing, the Court of Appeals, per Circuit Judge Chambers, stated:

"The case is remanded."

However, on May 8, 1978, the Court of Appeals did not remand the case but instead filed its Judgment (App. A,



*infra*, p. A1) and its Order of Affirmance (App. C, *infra*, p. A3), citing *Feres*. No opinion issued. In addition, the Court of Appeals conspicuously misstated that Poe had brought a "civil rights act action" against military personnel rather than a Federal Tort Claims Act action against the United States, as alleged in his complaint.

On May 22, 1978, the undersigned filed a notice of appearance as attorney for the petitioner along with a Petition for Rehearing.

On July 12, 1978, the Court of Appeals filed without opinion its Order Denying Petition for Rehearing (App. B, *infra*, p. A2).

### REASONS FOR GRANTING THE WRIT

A writ of certiorari should issue in this case because:

1. The decisions of the District Court and the Court of Appeals are in apparent conflict with statutory law, i.e., 28 U.S.C. 2680(h), as amended by Section 2 of P.L. 93-253, 88 Stat. 50.

The "Section 2" amendment to the Federal Tort Claims Act [hereafter "FTCA"] was approved by Congress and became effective on March 16, 1974.

The explicit language of P.L. 93-253, § 2, and the intent of Congress, as indicated by Senate Report No. 93-588, November 29, 1973,<sup>1</sup> appear to suggest that said statute controls the instant case and that the District Court and the Court of Appeals not only misapplied the *Feres* rule but disregarded statutory law. In effect, the courts below

1. Senate Report No. 93-588 is reprinted at pp. 2789-2792 of the U.S. Code Cong. & Adm. News, 93rd Congress, 2d Session, 1974, Vol. 2. An excerpt from Senate Report No. 93-588 is also printed at p. 38969 of the Congressional Record—Senate, Vol. 119, Part 30, 93rd Congress, 1st Session, Nov. 30, 1973.

"tacitly ruled" that P.L. 93-253, § 2, provides a remedy *only* for civilians and *not* for servicemen.

According to Senate Report No. 93-588, the purpose of the "Section 2" amendment to the FTCA was to provide a remedy against the United States for the intentional torts and abuses of its investigative and law enforcement officers. In fact, Section 2 of P.L. 93-253 *defines* the term "investigative or law enforcement officer" as any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violation of federal law. Furthermore, 28 U.S.C. 2671 provides that the term "employee of the government" includes members of the military forces of the United States. See also, *Feres v. United States*, 340 U.S. 135, 138 (1950).

Senate Report No. 93-588 also indicates that (a) the ["Section 2"] amendment should not be limited to constitutional tort situations but would apply to any case in which federal law enforcement agents committed the tort while acting under color of federal law; (b) borderline cases, such as trespass and invasion of privacy, would be viewed as clearly within the scope of the FTCA if the amendment were adopted; and (c) the amendment was considered a minimal first step in providing a remedy against the United States for innocent victims of federal law enforcement abuses.

2. The conclusions of the courts below, apparently ignoring the explicit language of P.L. 93-253, § 2, mandate that this Court exercise its power to authoritatively interpret the law to insure uniformity in the administration of justice and to insure fairness to the plaintiff in the instant case. An articulated, judicial interpretation of P.L. 93-253, § 2, would discharge a basic function of this Court; the meaning of the important federal statute involved in this

case cannot be discerned in the *opinionless* rulings of the courts below.

Indeed, the district court invited this Court's participation in this case when, in dismissing Mr. Poe's *pro se* action after taking no evidence to establish that his injuries were *not* sustained in the line of duty, it stated:

"\* \* \* and I'm not at all confident that I know what the law is right now, although I wrote one of these opinions myself laying out what I thought the law was a few months back. But, in the absence of some teaching from my superiors in the appellate divisions, it appears to me that this case is governed by *Feres* and *Gamage*, and I'll grant the motion to dismiss."

In his Petition for Rehearing, petitioner claimed that if P.L. 93-253, § 2, provides a remedy *only* for civilians and *not* for servicemen, then the Court of Appeals should so rule in a published opinion. No opinion issued.

3. The decisions of the District Court and the Court of Appeals were not only premature but were apparently contrary to the previous rulings of this and other federal courts. The District Court and the Court of Appeals misapplied *Feres* to the instant case *prior* to determining a dispositive question of fact: Were Poe's injuries sustained in the course of his military duty? But the *Feres* rule would *not* be a bar to recovery by the plaintiff if his injuries were *not* sustained in the line of duty, and he was entitled to produce evidence to support this contention. This is so because:

(a) While servicemen who suffer injuries arising out of activity incident to service *cannot* recover against the Government under the FTCA, see *Feres, supra*, 340 U.S. at 146, members of the armed forces *may* recover under the

FTCA for injuries *not* caused by their military service. *Brooks v. United States*, 337 U.S. 49, 50-53 (1949); *Mills v. Tucker*, 499 F.2d 866, 867 (9 Cir. 1974).

(b) In *Brooks*, the Supreme Court *rejected* the Government's contention that there could be no liability to the plaintiffs solely because they were in the Army when they sustained their injury. See *Feres, supra*, 340 U.S. at 146.

(c) "The *Brooks* case, however, makes clear that the mere fact that a claimant at the time of injury is a serviceman does not automatically bar his Tort Claims Act relief." *Hale v. United States*, 416 F.2d 355, 358 (6 Cir. 1969). Indeed the Sixth Circuit remanded the *Hale* case to allow the district court to decide the Government's motion to dismiss by taking testimony on what it deemed to be the appropriate question: Did Hale's injuries arise out of or in the course of military duty? See *Hale, supra*, 416 F.2d at p. 360.

(d) "The *Feres* decision did not disapprove of the *Brooks* case. It merely distinguished it, holding that the Tort Claims Act does not cover 'injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.' 340 U.S. 135, 146." *United States v. Brown*, 348 U.S. 110, 112 (1954).

(e) The existence of plaintiff's right to any other compensation does not preclude recovery under the FTCA but would only reduce the amount of any judgment under the FTCA. *Brown, supra*, at p. 113.

(f) In *Brown, supra*, at p. 113, the Supreme Court declared:

"We adhere also to the line drawn in the *Feres* case between injuries that did and injuries that did not arise out of or in the course of military duty. Since

the negligent act giving rise to the injury in the present case was not incident to the military service, the *Brooks* case governs \* \* \*."

(g) Rule 2 in Table 12-1, Air Force Manual 112-1, "Claims Manual," dated 1 Dec. 1972, indicates:

"If a claimant is a member of a U.S. Armed Force in active Federal service and damage, injury or death was not incident to his service, then he is a proper claimant (Note 1)."

(h) The instant case involves alleged *intentional* and *malicious* torts by employees of the Government. In *Dinsman v. Wilkes*, a marine was permitted to bring an action against his commanding officer, Captain Wilkes, for punishment inflicted upon him for refusing to do duty, because there was evidence of malice, cruelty and oppression in Dinsman's imprisonment and in the manner and circumstances attending said imprisonment. See *Dinsman v. Wilkes*, 12 How. [53 U.S.] 390, 402-403 (December Term, 1851). The authority and command entrusted to an officer,

"when it has been exercised from proper motives [emphasis supplied], should be firmly supported in the courts of justice, \* \* \*. And if it is not, the flag of the United States would soon be dishonored \* \* \*. But at the same time it must be borne in mind that the nation would be equally dishonored, if it permitted the humblest individual in its service to be oppressed and injured by his commanding officer, from malice or ill-will, or the wantonness of power, without giving him redress in the courts of justice." *Dinsman, supra*, at p. 403.

(i) The District Court dismissed the instant action before an answer was filed. In dismissing the action,

the District Court and the Court of Appeals *erroneously assumed* (1) the good faith and rectitude of Poe's superior officers and (2) that the injuries sustained by Poe arose out of his military duty. Poe disputes these assumed facts. Poe seeks an opportunity to prove that Air Force medical and command authorities *retaliated* against him when he would not drop his routine Inspector General Complaints. This alleged retaliation, Poe contends, was in violation of Air Force Regulation 123-11, "The Inspector General Complaint System."

Because Mr. Poe was *never* afforded an opportunity to challenge the assumptions implicit in the rulings of the courts below, further proceedings are mandated. See *Scheuer v. Rhodes*, 416 U.S. 232, 249-250 (1974). Considerations of fairness and elementary procedural due process demand that Mr. Poe be entitled to be heard in light of the serious and substantial allegations pleaded by his complaint.

4. Finally, and perhaps most importantly, a writ of certiorari should be granted because the question remains as to whether the FTCA exclusion applies to injuries arising out of "line of duty" or "in the course of military duty" or "out of an activity incident to service" or "out of a course of activity incident to service."

This Court has apparently never had before it a case which required it to make a clear-cut choice between the above "standards" as found in the *Brooks*, *Feres*, and *Brown* cases, *supra*. This case presents an opportunity to clarify the law in an area relevant to the lives of millions of present, former, and future United States military personnel.



**CONCLUSION**

For the reasons and authorities hereinabove stated, the petitioner respectfully requests that this Honorable Court grant this petition for a writ of certiorari.

Respectfully submitted,

BROOK HART

*Attorney for Petitioner*

October, 1978

**APPENDIX**

UNITED STATES COURT OF APPEALS

For the Ninth Circuit

No. 77-1956

DC Cv76-0392 SPK

LEWIS W. POE,  
Plaintiff/Appellant,

vs.

UNITED STATES OF AMERICA,  
Defendant/Appellee.

**JUDGMENT**

(Filed July 25, 1978)

APPEAL from the United States District Court for the District of HAWAII.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of HAWAII and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered MAY 8, 1978



A2

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

No. 77-1956

LEWIS W. POE,  
Appellant,  
vs.  
UNITED STATES OF AMERICA,  
Appellee.

**ORDER DENYING PETITION  
FOR REHEARING**

(Filed July 12, 1978)

Before: CHAMBERS, WALLACE and ANDERSON, Cir-  
cuit Judges.

The panel as constituted above has voted to deny  
the petition for rehearing.

The full court has been advised of the suggestion  
for rehearing en banc and no judge of the court has re-  
quested a vote on the suggestion for rehearing en banc.  
Fed. R. App. P. 15(b).

The petition for rehearing is denied and the suggestion  
for rehearing en banc is rejected.

A3

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

No. 77-1956

LEWIS W. POE,  
Appellant,  
vs.

UNITED STATES OF AMERICA, et al.,  
Appellees.

**ORDER OF AFFIRMANCE**

[May 8, 1978]

Appeal from the United States District Court  
for the District of Hawaii

Before: CHAMBERS, WALLACE and ANDERSON.  
Circuit Judges.

Appellant's civil rights act action against certain mili-  
tary officers and enlisted men, for alleged torts occurring  
while he was under orders on active duty, was properly  
dismissed by the district court. *Feres v. United States*,  
340 U.S. 135 (1950).

Affirmed.